Dureya Gibson, d/b/a Fresh Alternative Painting & Decorating Company, and its alter ego, Surface's Paint & Decorating *and* International Brotherhood of Painters and Allied Trades, Local Union No. 1396, AFL–CIO. Case 7–CA–36155

January 30, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

Upon a charge and an amended charge filed by International Brotherhood of Painters and Allied Trades, Local Union No. 1396, AFL–CIO (the Union) on July 14 and August 8, 1994, respectively, the General Counsel of the National Labor Relations Board issued a complaint and amendment to complaint on August 30 and September 19, 1994, respectively, alleging that Dureya Gibson, d/b/a Fresh Alternative Painting & Decorating Company, and its alter ego, Surface's Paint & Decorating, the Respondent, has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge, amended charge, complaint and amendment to complaint, the Respondent failed to file an answer.

On December 28, 1994, the General Counsel filed a Motion for Default Summary Judgment on the pleadings with the Board. On December 30, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint and amendment to complaint affirmatively note that unless an answer is filed within 14 days of service, all the allegations in the complaint and amendment to complaint will be considered admitted. Further, the undisputed allegations in the Motion for Default Summary Judgment disclose that the Region, by letter dated October 20, 1994, notified the Respondent that unless an answer were received by October 28, 1994, a Motion for Default Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Dureya Gibson, an individual, has owned and has done business as Fresh Alternative Painting & Decorating Company, a sole proprietorship. At all material times since about May 23, 1994, Antoinette Gibson, an individual and wife of Dureya Gibson, has owned and has done business as Surface's Paint & Decorating, a sole proprietorship. About May 23, 1994, Surface's Paint & Decorating was established by Dureya Gibson and Antoinette Gibson as a disguised continuance of Fresh Alternative Painting & Decorating Company.

Based on the conduct described above, Fresh Alternative Painting & Decorating Company and Surface's Paint & Decorating are, and have been at all material times since about May 23, 1994, alter egos and a single employer.

At all material times prior to about March 28, 1994, the Respondent maintained an office and place of business at 300 Kalamazoo Street, South Haven, Michigan. At all material times since March 28, 1994, the Respondent has maintained an office and place of business at 34233 M-140 Highway, Covert, Michigan. At both locations, the Respondent has been engaged in the construction industry as a commercial and industrial painting contractor.

During the 12-month period ending March 15, 1993, the Respondent provided painting services valued in excess of $40,000 directly to the Covert, Michigan Public Schools, a political subdivision of the State of Michigan, and painting services valued in excess of $17,000 directly to Pullman Industries, Inc., an enterprise located within the State of Michigan, each of which enterprises are directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About November 5, 1992, the Respondent, an employer engaged in the building and construction industry, entered into a collective-bargaining agreement with the Union effective for the period May 17, 1992, to May 17, 1995.

[1] On January 3, 1995, the General Counsel filed a supplemental pleading further submitting that the administrative hearing originally scheduled for December 16, 1994, had been postponed, and that its original motion was timely filed.

The collective-bargaining unit (the unit) set forth in the collective-bargaining agreement is appropriate for purposes of collective bargaining.

Since about November 5, 1992, and at all material times, the Union has been recognized by the Respondent as the exclusive collective-bargaining representative of the unit. Such recognition has been embodied in the 1992-1995 collective-bargaining agreement.

At all times since November 5, 1992, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.[2]

Since about March 7, 1994, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

Since about March 7, 1994, the Respondent failed to continue in effect its collective-bargaining agreement with the Union, and ceased to make the following contractually required deductions and contributions on behalf of employees employed in the unit:

(a) Administrative dues
(b) Vacation fund
(c) Insurance fund
(d) Michigan State Building Trade Fund
(e) B.A. Assessment
(f) Benton Harbor J.A.T.C. Apprenticeship Fund

Although the subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit, and are mandatory subjects for the purposes of collective bargaining, the Respondent engaged in the conduct described above without the Union's consent and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

Since about March 7, 1994, the Respondent, through Dureya Gibson, has bypassed the Union and dealt directly with its employees in the unit by soliciting employees to enter individual employment agreements, including deferred payment, barter, and nonwage employment agreements for unit work.

[2] The September 19, 1994 amendment to the complaint deleted the allegations in the original complaint that the Union was recognized as the exclusive bargaining representative without regard to its majority status, and that it has been the limited exclusive bargaining representative of the unit employees. Nevertheless, the complaint's commerce data indicates that the Respondent is a construction industry employer subject to the provisions of Sec. 8(f) of the Act. Accordingly, in the absence of an allegation that the bargaining relationship was actually based on 9(a) majority support, we find that the relationship was entered into pursuant to Sec. 8(f), and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See, e.g., *Electri-Tech, Inc.*, 306 NLRB 707 fn. 2 (1992) (citing *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 8(d) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to recognize and bargain with the Union as the limited exclusive bargaining representative of the unit employees, to comply with the 1992–1995 agreement, and to make whole the unit employees for any loss of wages or earnings they may have suffered as a result of the Respondent's failure to do so since March 7, 1994, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 52 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, we shall order the Respondent to make all contractually required deductions and to reimburse the Union and/or the Funds for its failure to do so since March 7, 1994, with interest as prescribed in *New Horizons for the Retarded*, supra. Finally, we shall order the Respondent to make whole the unit employees by making all required contributions that have not been made since March 7, 1994, including any additional amounts due on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and by reimbursing them for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Dureya Gibson, d/b/a Fresh Alternative Painting & Decorating Company, and its alter ego, Surface's Paint & Decorating, Covert, Michigan, its officers, agents, successors, and assigns, shall

[3] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that Respondent otherwise owes the fund.

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the International Brotherhood of Painters and Allied Trades, Local Union No. 1396, AFL–CIO, as the limited exclusive collective-bargaining representative of the employees in the unit.

(b) Failing and refusing to comply with the 1992–1995 collective-bargaining agreement with the Union and ceasing to make contractually required deductions and contributions on behalf of unit employees for administrative dues, Vacation fund, Insurance fund, Michigan State Building Trade Fund, B.A. Assessment, Benton Harbor J.A.T.C. Apprenticeship Fund.

(c) Bypassing the Union and dealing directly with the employees in the unit by soliciting the employees to enter into individual employment agreements, including deferred payment, barter, and nonwage employment agreements for unit work.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the Union as the limited exclusive bargaining representative of the employees in the unit set forth in the 1992–1995 collective-bargaining agreement and comply with the terms and conditions of that agreement.

(b) Make whole the unit employees for any loss of wages or earnings they may have suffered as a result of its unlawful conduct and by making all required contributions that have not been made since March 7, 1994, and by reimbursing them for any expenses ensuing from its failure to make the required contributions, as set forth in the remedy section of this decision.

(c) Make all contractually required deductions and reimburse the Union and/or the Funds for its failure to do so since March 7, 1994, as set forth in the remedy section of this decision.

(d) Make whole the unit employees by making all required contributions that have not been made since March 7, 1994, and by reimbursing them for any expenses ensuing from its failure to make the required contributions, as set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Covert, Michigan, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to recognize and bargain with the International Brotherhood of Painters and Allied Trades, Local Union No. 1396, AFL–CIO, as the limited exclusive collective-bargaining representative of the employees in the unit.

WE WILL NOT fail and refuse to comply with the 1992–1995 collective-bargaining agreement with the Union and cease to make contractually required deductions and contributions on behalf of unit employees for administrative dues, Vacation fund, Insurance fund, Michigan State Building Trade Fund, B.A. Assessment, Benton Harbor J.A.T.C. Apprenticeship Fund.

WE WILL NOT bypass the Union and deal directly with employees in the unit by soliciting the employees to enter into individual employment agreements, including deferred payment, barter, and nonwage employment agreements for unit work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain with the Union as the limited exclusive bargaining representative of the employees in the unit set forth in the 1992–1995 collective-bargaining agreement and comply with the terms and conditions of that agreement.

WE WILL make whole the unit employees for any loss of wages or earnings resulting from our failure to comply with the terms and conditions of the 1992–1995 agreement, with interest.

WE WILL make all contractually required deductions and reimburse the Union and/or the Funds for our failure to do so since March 7, 1994, with interest.

WE WILL make whole the unit employees by making all required contributions that have not been made since March 7, 1994, and by reimbursing them for any expenses ensuing from our failure to make the required contributions, with interest.

DUREYA GIBSON, D/B/A FRESH ALTERNATIVE PAINTING & DECORATING COMPANY, AND ITS ALTER EGO, SURFACE'S PAINT & DECORATING